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775229—48

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 519

LEE FOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 546–547) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 19, 1947 (R. 548), and a petition for rehearing was denied December 8, 1947 (R. 552). The petition for a writ of certiorari was filed January 7, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in commenting during the cross-examination of petitioner that it was a "plain inference" from the evidence that petitioner, who was being tried for first degree murder, must have been "mad" at the deceased.

2. Whether the trial court erred in refusing to instruct the jury that under the evidence the fatal blow could have been inflicted in the laundry before there were any eyewitnesses to the struggle.

3. Whether the trial court's instructions were so one-sided as to require reversal.

4. Whether the trial court erred in not granting a new trial because of a remark made by the interperter and overheard by one juror.

STATEMENT

Petitioner was indicted in the District Court of the United States for the District of Columbia in one count charging him with murder in the first degree (R. 488). After a jury trial, he was found guilty as charged and on April 1, 1947, he was sentenced to death (R. 484, 490, 492–493).

The evidence for the Government may be summarized as follows:

Two witnesses testified that they observed petitioner and the deceased, Harry Lee, arguing about a week before the killing and heard petitioner say that he would "get" the deceased, or "get even" with him (R. 67–70, 85–88). The deceased

lived at a laundry which he operated (R. 352). On the Sunday afternoon the killing occurred three witnesses saw petitioner pursuing the deceased up and down the street near the laundry (R. 114–115, 187, 235). Two of the witnesses saw a knife in petitioner's hand (R. 188, 237). When the witnesses first noticed the pursuit, petitioner and the deceased were already about ninety feet from the laundry (R. 128), and the deceased was holding his hand to his right side where his clothing was stained with blood (R. 263, 295). After the chase had lasted for about three and one-half minutes, petitioner put his hand on the deceased's shoulder and the latter fell (R. 114–115, 235). Petitioner placed his knee on the prostrate body of the deceased and stabbed him repeatedly, over a space of a minute and a half (R. 116, 125, 128, 187, 235). Petitioner then put the knife in the deceased's hand where it was later found by the police (R. 236, 306). The final struggle was seen by three additional witnesses (R. 96–101, 129–132, 148–150). The deputy coroner testified that the body of the deceased had numerous superficial cuts on both sides of the body, involving the abdomen and thighs, but that death was due to punctures of the liver resulting from two stabs several inches to the right of the navel (R. 46–49). Petitioner's only explanation at the scene was that the deceased was a son of a bitch who caused too much trouble (R. 116); two hours later he told the police that the deceased had

attacked him with the knife in the laundry as the result of an argument, and that he took the knife away from the deceased (R. 333–334). There was testimony by employees of the deceased that they had never seen the knife on his premises (R. 413–414, 417).

Petitioner testified that his son had been brought into this country from China upon the representation that he was a son of the deceased's father; that the son was ill and petitioner desired to return him to China, but that he needed papers from the deceased's father to do so; that the deceased had put him off several times, and he finally went to the laundry to get the papers; that the deceased refused him the papers; that petitioner then said that he would wait until the deceased was ready to go back to China and would then report the affair to the immigration authorities; that the deceased snatched up a knife and attacked him, and that in defending himself he may have "knocked the knife into" deceased; that he then ran out into the street ahead of the deceased and fought him there because he was frightened; that he was so frightened he could not remember much of the struggle (R. 385–411).

ARGUMENT

1. Petitioner contends (Pet. 3–5) that he was prejudiced by the trial judge's comments on an answer given by him during the course of his

cross-examination. The passage in question reads as follows (R. 404–405):

> Q. On this last Sunday you went up to see him, did he give you the information you wanted?
>
> A. No, he don't give.
>
> Q. And you were mad with him because you didn't get the information? Isn't that the fact?
>
> A. No; I am not mad at him. "If you don't give me, I go Immigration authorities."
>
> Q. If you were not mad, why did you threaten to go to the Immigration authorities?
>
> The COURT. I think it is a plain inference that he must have been mad at him.
>
> Mr. FAULKNER [defense counsel]. I don't think it is an inference, Your Honor.
>
> The COURT. He must have been angry, if he threatened to denounce him to the Immigration authorities.
>
> Mr. FAULKNER. I think that is going into the man's mind. I don't think it is an inference.
>
> The COURT. That is the inference I draw.
>
> Mr. FAULKNER. I think it is an erroneous one.
>
> The COURT. And, as you know, I have a right to comment on the facts. My inference is not binding on the jurors, however. They can draw their own inference.
>
> By Mr. MOLENOF [attorney for the Government]:

Q. After you threatened to go to the Immigration authorities, what did Toy do and say?

Mr. FAULKNER. Your Honor, I object to the use of the word "threaten." He never said he threatened him; he "told" him he would.

By Mr. MOLENOF:

Q. After you told him you would go to the Immigration authorities, what did he say?

A. Lee Ying Toy got frightened, because I threatened to go to Immigration authorities. So he snatched a knife and hit me.

Petitioner argues that he had explained that he went to the laundry seeking certain information, but that the judge's comment prevented the jury from giving credit to his explanation and left in their minds the impression that he "went there mad," i. e., with malicious intent.

We submit that petitioner's inference is unwarranted, and that the jury could only have understood the judge's comments as referring to petitioner's state of mind *after* he had been refused the information he sought. There is nothing in the immediate context to connect the comment with petitioner's state of mind before he entered the laundry. Furthermore, it is well settled that in the federal courts the trial judge has the right to comment on the evidence provided that it is done dispassionately and the jury is unequivocally given to understand that they are not bound

thereby. *United States* v. *Maggio,* 126 F. 2d 155, 160 (C. C. A. 3), certiorari denied, 316 U. S. 686; *United States* v. *Bob,* 106 F. 2d 37, 40 (C. C. A. 2), certiorari denied, 308 U. S. 589; see also *United States* v. *Murdock,* 290 U. S. 389, 394. Here the judge immediately stated that the comment did not bind the jury and they were carefully and repeatedly cautioned in this respect in the court's final instructions.[1] Of course, the trial judge's comments on the evidence will often reflect upon the credibility of a witness, but we submit that there is no parallel between this case, in which the court merely stated a clear inference from a fact as to which there was testimony, and cases like *DeGroot* v. *United States,* 78 F. 2d 244, 249–250 (C. C. A. 9), cited by petitioner (Pet. 5), in which the judge remarked that the witness had followed a steady course of "trying to build herself up."

2. Petitioner contends (Pet. 6–7) that the jury should have been instructed that under the evidence the fatal wound could have been inflicted

[1] "You * * * are the sole judges of the facts * * *. The Court will discuss the facts and the evidence with a view of endeavoring to assist and aid you in your deliberation and in arriving at your conclusion. But if your recollection of the evidence in any particular differs from the Court's recollection, then your recollection must prevail, because the final decision on the facts is solely within your domain" (R. 467–468). The substance of this instruction was later repeated three times toward the close of the charge (R. 476–477, 478). The jury were also told that they were the "sole judges of the credibility of witnesses" (R. 470).

in the laundry.[2] The evidence relied upon is that the deceased's garments were already bloodstained when first observed by the witnesses in the street; that he was making gutteral sounds of distress; that at the end of the chase he was so exhausted that a push by petitioner was enough to cause him to fall; and that both fatal wounds were on the deceased's right side. Petitioner also asserts, though we think without justification, that there was evidence that he was not in a position to strike the deceased in the right side during the struggle in the street. The court declined to give the requested charge on the ground that there was no evidence that the fatal wound had been inflicted in the laundry. Petitioner argues in this connection that, since the evidence pertaining to the Government's case was summarized at length, he was prejudiced by not receiving the same treatment.

We think the evidence was not such as to necessitate the instruction requested. There is nothing in the record to support the contention that the deceased could not have been stabbed in the right side in the final struggle. Death resulted from the two punctures of the liver, either of which might have been fatal, but there were numerous superficial cuts about the abdomen and thighs. The most that petitioner said about the wound inflicted in the laundry was that he "may

[2] Petitioner evidently wanted to avoid the inference of deliberation involved in the pursuit, and desired the jury to believe, either that the fatal blow was an accidental result of the scuffle in the laundry, or that it was inflicted in "hot blood" at the outset of the quarrel.

be" knocked the knife into the deceased during the alleged scuffle for possession. In view of the deceased's exertions during the pursuit and in view of the fact that he still struggled sometime after he fell in the street (R. 100, 152), it seems highly unlikely that the wound inflicted in the laundry was more than superficial.[3] It is, of course, settled that the trial judge need not give a requested charge unless there is evidence to support it. *Battle* v. *United States,* 209 U. S. 36, 38; *Bird* v. *United States,* 187 U. S. 118, 132–133; *Grace* v. *United States,* 4 F. 2d 658, 661–662 (C. C. A. 5), certiorari denied, 268 U. S. 702; *Hamburg-American Steam Packet Co.* v. *United States,* 250 Fed. 747, 765 (C. C. A. 2), certiorari denied, 246 U. S. 662. Furthermore, the coroner testified (R. 46–49) that there were *two* fatal wounds, either one of which could have caused the death, and there was no evidence whatever to indicate that both were inflicted in the laundry. At most the court could only have told the jury that there was some evidence that *one* fatal wound was inflicted in the laundry. It cannot

[3] Before petitioner took the stand the court, being under the impression that he would definitely testify that he had stabbed the deceased in self-defense while they were still in the laundry, directed that the coroner be called as the court's witness to testify as a medical expert whether a man fatally stabbed in the liver could do all the running the deceased did (R. 380–385). But after petitioner had failed to testify definitely that a wound had been inflicted in the laundry, the court withdrew the order (R. 406–407). Petitioner's attorney made no effort thereafter to introduce such testimony himself.

be "held reversible error to refuse [an instruction] which under the circumstances of the case could not reasonably have affected the result." *Goins* v. *United States,* 99 F. 2d 147, 149 (C. C. A. 4), certiorari dismissed, 306 U. S. 622.

3. Petitioner contends (Pet. 7–8) that the court's charge was so one-sided as to constitute reversible error. We submit that a reading of the charge as a whole (R. 466–478) convinces that it was eminently fair to petitioner in all respects. Contrary to his contention, a relatively small portion of the charge was devoted to a discussion of the evidence. For the most part it deals with the applicable general principles, such as the duty of the jury as triers of the facts, presumption of innocence, reasonable doubt, credibility of witnesses, and the nature of first and second degree murder and manslaughter. If rather more space was devoted to a discussion of the Government's evidence than to petitioner's, that was obviously because the evidence for the prosecution was so much fuller in detail.

4. Petitioner's final contention (Pet. 8–10) is that the trial court erred in refusing to grant a new trial (R. 494–497) because a juror overheard a remark by the interpreter during the course of the trial and failed to report it to the court. The court held a full hearing (R. 509–542) on the motion, at which the juror testified that all he overheard the interpreter say was, "I wouldn't believe a word he [petitioner] said," and that the

remark was not addressed to him and had no influence whatsoever on his decision. Petitioner's attorney testified that the juror had earlier related the event to him, but his version of the juror's disclosure was much different than the juror's version on the stand. The attorney's version was rejected by the court, which, after careful consideration, found that petitioner had not been prejudiced. Although there is a presumption of prejudice when any communication to a juror is shown, the presumption is rebuttable. *United States* v. *Sorcey,* 151 F. 2d 899, 903 (C. C. A. 7), certiorari denied, 327 U. S. 794. We think it manifest that no prejudice was caused here. This case is obviously distinguishable from those cited by petitioner, such as *Rakes* v. *United States,* 163 F. 2d 771 (C. C. A. 4), in which actual attempts were made to influence jurors.

CONCLUSION

The decision of the Court of Appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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